Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

GROUND IMPROVEMENT TECHNIQUES, INC., ROBERT E. KINGHORN, TED L. HOEY, and CHARLIE THOMAS,

Petitioners,

v.

COLUMBIA COUNTY, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN ROGER SCHOOLEY
Counsel of Record
HOLLAND & KNIGHT
200 S. Orange Avenue
Suite 2600
P.O. Box 1526
Orlando, Florida 32802
(407) 425-8500

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether a state can constitutionally discriminate against non-residents by adopting and applying local preference procurement resolutions favoring its local constituents.

II. Do non-resident corporate employees who are denied work opportunities due to a state's application of local resident preferences thereby suffer sufficient individual injury-in-fact to assert civil rights claims under the United States Constitution and 42 U.S.C. § 1983.

III. Can a corporate entity claim associational standing for the benefit of its employees to contest discriminatory resident preference resolutions as violative of the Privileges and/or Immunities clauses of the United States Constitution and 42 U.S.C. § 1983.

IV. Whether a corporate entity can claim standing on its own behalf to contest discriminatory resident preference resolutions as violative of the Privileges and/or Immunities clauses of the United States Constitution and 42 U.S.C. § 1983.

INTERESTED PARTIES

The following persons and entities have or may have an interest in the outcome of this case:

Administration, Columbia County, Florida
- Marlin Feagle, Esq.
- Bascom Norris
- Lisa Roberts
- Dale Williams

Board of County Commissioners of Columbia County, Florida
- James W. Knox
- Finley J. Little
- James Montgomery
- Ludie Shipp
- Ronald Williams

Darabi and Associates, Inc.
- Charles R. Caudel
- Frank A. Darabi, P.E.
- Will Furlong

Darby, Peele, Bowdoin & Payne
- Austin Peele, Esq.

Ground Improvement Techniques, Inc.

Ted L. Hoey

Holland & Knight
- Steven R. Schooley, Esq.

Robert E. Kinghorn

Nabors, Giblin & Nickerson, P.A.
- Thomas H. Duffy, Esq.
- Maureen McCarthy, Esq.
- Gregory T. Stewart, Esq.

Charlie Thomas

STATEMENT OF PARENT, SUBSIDIARY AND AFFILIATE CORPORATIONS

Pursuant to Supreme Court Rule 29.1, Ground Improvement Techniques, Inc. has no parent, subsidiary or affiliated corporations.

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OPINIONS BELOW

Petitioners seek review of the per curiam decision of the Eleventh Circuit Court of Appeals found in the Appendix to this petition at App. 1.[1] The United States District Court for the Middle District of Florida issued an Order dismissing the individual petitioners' constitutional challenges and entering summary judgment against the corporate petitioner's claims. The District Court's Order, which is unreported, appears in the Appendix at App. 2.

JURISDICTIONAL GROUNDS

Pursuant to 28 U.S.C. § 1254(1), petitioners, Ground Improvement Techniques, Inc., Robert E. Kinghorn, Ted L. Hoey, and Charlie Thomas, file this Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals seeking review of the Circuit Court's January 30, 1995 per curiam decision affirming the district court's dismissal of the individual petitioners' constitutional challenges and entering summary judgment against the corporate petitioner's constitutional claims.

[1] Citations to the attached Appendix are designated as "App. ___."

RELEVANT STATUTES

Civil Rights, 42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Resolution No. 88R-16.

Reproduced in the Appendix at App. 17.

STATEMENT OF THE CASE AND FACTS

This case presents critical issues involving state implemented local bid preference procurement statutes that discriminate against non-resident individuals and companies to prevent non-residents from competing against local constituents. Respondent, Columbia County, Florida ("County"), adopted and applies a statutory procurement resolution mandating a five percent (5%) bid preference favoring its resident constituents to discriminate against non-residents. In this action, Mr. Kinghorn, Mr. Hoey, Mr. Thomas, and their closely held company,

Ground Improvement Techniques, Inc. ("GIT"), challenge the constitutionality of the County's statutory scheme.

This constitutional challenge factually arises from the County's procurement of labor, services, and materials required for construction of a landfill site. On March 19, 1991, in response to the County's multi-state solicitation, GIT submitted a sealed bid for the contract award on the landfill construction project. After independently reviewing the seven competing bids, the County's consulting engineer determined that GIT was the lowest responsible bidder and that GIT's bid met or exceeded all criteria set forth in the project documents. However, the County unilaterally opted to utilize a previously unreferenced procurement statute (Resolution No. 88R-16, attached at App. 17) to provide a 5% preference favoring the only local company bidding on the project. The County thereby denied GIT and its employees the contract award they were entitled.

Denied the opportunity to travel, live, and work in Columbia County, Florida as specialty geotechnical contractors, Mr. Kinghorn, Mr. Hoey, Mr. Thomas, and GIT challenge the constitutionality of the County's statutory scheme. Petitioners attack the County's discriminatory preference resolution as unconstitutional pursuant to the Privileges and/or Immunities clauses of Article IV § 2 and the Fourteenth Amendment, the Equal Protection clause of the Fourteenth Amendment, the Due Process clause of the Fourteenth Amendment, the Commerce Clause of the United States Constitution, and for violation of 42 U.S.C. § 1983.

The district court denied all of the petitioners' constitutionally grounded claims for injunctive, declaratory, and other relief. In granting the County's motion for dismissal of the individual petitioners' constitutional challenges and in entering summary judgment against the corporation's claims, the district court upheld the County's discriminatory local preference statute. The Eleventh Circuit affirmed.

WHY THE WRIT SHOULD BE GRANTED

This case presents the critical unanswered question as to whether, in adopting and applying procurement policies to obtain goods and services, states may statutorily discriminate against non-resident individuals and entities in favor of local constituents without violating the constitutional protections and civil rights of non-residents. This question is becoming increasingly important because it implicates a continuously expanding aspect of our nation's economic fabric as it relates to the public procurement statutes of state and local governments nationwide. The lack of guidance as to the appropriate constitutional scrutiny to be accorded to state local preference procurement policies is clearly generating conflicts between and among the federal circuit courts of appeal, federal district courts and various state supreme courts. This Court has yet to address the question.

In the instant matter, the lower courts ruled that, although the individual petitioners may have suffered impacts upon salary, job security, and job opportunities due to the respondent's resident-based preference, these

matters were not a sufficiently personal injury-in-fact so as to support Article 3 standing. The lower court rulings highlight the narrowing application of this Court's recent decision in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fl.*, 508 U.S. ___, 113 S. Ct. 2297 (1993). Such a limitation, in conjunction with the increasing conflict among the lower courts as to the constitutional basis for local preference policies, certainly emphasizes the need for guidance with respect to standing on these important constitutional issues.

In addition to standing, this Court has yet to analyze the constitutional implications local preference procurement policies invoke with respect to violating the civil rights of non-residents. In *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208 (1984), this Court reviewed state resident-hiring preferences, but the Court's analysis was left incomplete because of an insufficient record. This constraint unfortunately prevented the Court from completely addressing its Privileges and Immunities analysis thus creating a void that as yet is in desperate need of constitutional resolution. As a result, there is a growing line of conflicting federal and state court decisions that involve the constitutionality of local preference resolutions.

For example, in *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994), the Fourth Circuit Court of Appeals upheld South Carolina's five percent (5%) local preference procurement statute but recognized direct conflict with the Seventh Circuit Court of Appeals' decision in *W.C.M. Window Co.*,

Inc. v. Bernardi, 730 F.2d 486 (7th Cir. 1984). In *Rayco Construction Co., Inc. v. Vorsanger*, 397 F. Supp. 1105 (E.D. Ark. 1975), the federal district court found Arkansas' three percent (3%) resident bid preference statute unconstitutional. A similar attack directed at the Illinois Preference Act was condoned in *E & E Construction Co. v. Illinois*, 674 F. Supp. 269 (N.D. Ill. 1987). However, the opposite results were reached with respect to San Francisco's five percent (5%) local business preference in *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) and Chicago's two percent (2%) preference statute in *J.F. Shea Co., Inc. v. City of Chicago*, 992 F.2d 745 (7th Cir. 1993).

Similar conflicts are arising where state constitutional doctrines are based on U.S. Constitutional standards. Due to the lack of constitutional guidance, state high courts are also struggling to resolve the matter. Compare, *Big D Construction Corp. v. Court of Appeals for State of Arizona, Div. One*, 789 P.2d 1061 (Ariz. 1990) wherein the Arizona Supreme Court ruled that a five percent (5%) local bid preference statute was unconstitutional, with the contrary ruling by the Wyoming Supreme Court in *Galesburg Construction Co., Inc. of Wyoming v. Board of Trustees of Memorial Hospital of Converse County*, 641 P.2d 745 (Wyo. 1982).

Finally, this case directly addresses the standing of modern corporate entities to assert constitutional claims grounded on the Privileges and/or Immunities clauses of the United States Constitution. Today, all constitutional doctrine with respect to this critical issue arises from some dated dicta in *Paul v. Virginia*, 75 U.S. 168 (1868). However, this Court has never squarely analyzed or addressed corporate standing under the Privileges and/

or Immunities clauses.[2] The resulting doctrinal void has left modern corporate employees without the same constitutional privileges and immunities protections or civil rights afforded all other workers in modern society. The instant case highlights the result of this constitutional disparity.

CONCLUSION

This case raises critical issues regarding the constitutional protections and freedoms afforded to individuals and entities that are in the pursuit of their chosen livelihoods. This Court should grant certiorari to ensure that constitutional protections are equally available and maintained throughout the United States of America for such individuals and entities.

Respectfully submitted,

STEVEN ROGER SCHOOLEY
Counsel of Record
HOLLAND & KNIGHT
200 S. Orange Avenue
Suite 2600
P.O. Box 1526
Orlando, Florida 32802
(407) 425-8500

Attorneys for Petitioners

[2] In *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486, 492 (7th Cir. 1984), the Seventh Circuit Court of Appeals particularly emphasized the lack of any satisfactory constitutional basis to deny modern corporations standing under the Privileges and/or Immunities clauses of the Constitution.

DO NOT PUBLISH

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-3423

D. C. Docket No. 91-692-CIV-J-20

GROUND IMPROVEMENT TECHNIQUES, INC., ROBERT E. KINGHORN, TED L. HOEY, CHARLIE THOMAS,

Plaintiffs-Appellants,

versus

COLUMBIA COUNTY, FLORIDA,

Defendant-Appellee.

Appeal From the United States District Court
For the Middle District of Florida

(January 30, 1995)

Before HATCHETT and COX, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

Affirmed. See Eleventh Circuit Rule 36-1.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GROUND IMPROVEMENT TECHNIQUES INC., et al.,

Plaintiffs,

v.

Case No. 91-692-Civ-J-20

COLUMBIA COUNTY, FLORIDA,

Defendant.
_____/

ORDER

Before the Court is Defendant's Motion to Dismiss Amended Complaint or, in the Alternative, for Summary Judgment (Doc. No. 28, filed August 11, 1992). Plaintiffs filed a response in opposition on October 19, 1992 (Doc. No. 51). Also before the Court is Plaintiffs' Motion for Partial Summary Judgment Against the Defendant for Wrongfully Denying Equal Protection of the Law (Doc. No. 57, filed December 22, 1992). Defendant filed a response in opposition on February 10, 1993 (Doc. No. 61).

Plaintiffs' Amended Complaint (Doc. No. 23, filed May 26, 1992) seeks to recover damages and challenges the constitutionality of Defendant's practices and policies with regards to its bidding process for a contract award for a landfill construction site. Plaintiffs allege that

"they"[1] submitted the lowest possible bid for the contract, and that the County then arbitrarily and capriciously – and in violation of the federal Constitution – awarded the contract to another bidder. Defendant asserts that Plaintiffs Hoey, Kinghorn and Thomas do not have standing to assert their individual claims; that GIT does not have associational standing to raise claims on behalf of its "members"; and that GIT has otherwise failed to state federal constitutional claims upon which this Court can grant relief. On these grounds, GIT has moved to dismiss all of Plaintiffs' claims or, in the alternative, for summary judgment. Because the standing issue with respect to the three individual Plaintiffs' claims can be resolved properly in the framework of a motion to dismiss, the Court will consider those claims within that context, but will treat the remainder of Defendant's Motion as one for summary judgment.

In deciding a motion to dismiss, the district court is required to view the complaint in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). A complaint should not be dismissed for failure to state a cause of action "unless it appears beyond doubt that the Plaintiff can prove no set acts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991). However, where on the basis of a dispositive

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[1] Plaintiffs continuously refer to themselves in the third person plural, as if the Plaintiffs collectively bid for the project. As discussed infra, however, Plaintiff GIT was the actual entity bidding for the contract, and, as such, the alleged injury can belong only to that Plaintiff.

issue of law no construction of the factual allegation will support the cause of action, the district court may dismiss the complaint. *Marshall Cty. Bd. of Educ. v. Marshall Cty. Gas D.*, 992 F.2d 1171, 1174 (11th Cir. 1993); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1539 (11th Cir. 1991).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court that there is an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 325. Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. *Id.* When a moving party has discharged its burden, the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. *Id.* at 324.

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the

evidence in the light most favorable to the nonmovant, *Key West Harbor v. City of Key West*, No. 92-4038, slip. op. 1486, 1490 (11th Cir. April 2, 1993), and resolve all reasonable doubts in that party's favor. *Spence v. Zimmerman*, 873 F.2d 256, 257 (11th Cir. 1989). The nonmovant need not be given the benefit of every inference, but only of every "reasonable" inference. *Brown v. City of Clewiston*, 848 F.2d 1534, 1540 n. 12 (11th Cir. 1988). The Eleventh Circuit has explained the reasonableness standard:

> In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." [citation omitted]. The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. *Augusta Iron and Steel Works v. Employers Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988). It must be emphasized that the mere existence of *some* alleged factual dispute will not defeat an otherwise properly supported summary judgment motion. Rather, "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

247-48 (1986). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

Plaintiffs Kinghorn, Hoey and Thomas

At the times relevant to this action, Robert E. Kinghorn was employed as Vice-President of GIT; Ted L. Hoey was President of GIT; and Charlie Thomas was employed by GIT as a geotechnical construction specialist. Each of these Plaintiffs has sued in his individual capacity for injunctive relief, alleging that Defendant's bidding Resolutions violate various parts of the Constitution. Kinghorn and Thomas, respectively, allege violations of the Privileges and Immunities Clauses of both Article IV, section 2, and of the Fourteenth Amendment (Counts II, III, V and VI); Kinghorn and Hoey, respectively, allege violations of the Equal Protection Clause of the Fourteenth Amendment (Counts XI and XII); and Kinghorn alone alleges a violation of the Due Process Clause of the Fourteenth Amendment (Count XIII). Defendant alleges that these Plaintiffs, suing as individuals, do not have standing to assert these claims.

Federal judicial power under Article III "exists only to redress or otherwise protect against injury *to the complaining party.*" *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (emphasis supplied). To obtain standing before a federal court, a plaintiff must suffer a real and immediate injury

in fact. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). This injury must be concrete in "both a qualitative and temporal sense," *Whitmore v. Arkansas*, 110 S. Ct. 1717, 1723 (1990), and is the "central component of Article III's 'case or controversy' requirement." *Region 8 Forest Serv. Timber Purchasers v. Alcock*, 993 F.2d 800, 805 (11th Cir. 1993) (citing *Allen v. Wright*, 468 U.S. 737 (1984)). A federal court may not create its own jurisdiction simply by "embellishing otherwise deficient allegations of standing." *Whitmore*, 110 S. Ct. at 1723.

The Court has limited its analysis of the standing questions to a reading of the Amended Complaint, and has assumed as true all the facts alleged therein. As to this issue, the only possible conclusion is that the rights asserted by Kinghorn, Hoey and Thomas are, as Defendant argues, "not personal but rather derive from their relationship with GIT." Memorandum of Law (Doc. No. 30) at 5.

This lawsuit was filed because *GIT* failed to be awarded the contract for the construction of Defendant's landfill. GIT's bid for this contract was approximately $2.8 million, and had the bid been accepted, the *company* would have realized a project-revenue in this amount, or perhaps more. The Court must emphasize that *GIT* was the entity submitting the bid, not Kinghorn, Hoey or Thomas.

In this sense, Plaintiffs simply are wrong when they state, in opposition to the Motion, that they are not foreclosed from asserting individual rights "simply because they are employees of GIT." Memorandum in Opposition (Doc. No. 51) at 12. Clearly, a great deal of individual

effort is expended in the preparation of bids for public works projects, and the Court is mindful of the differing and complex risks and factors which must be ascertained and weighed. Nevertheless, and under the simplest application of agency principles, any and all such individual efforts are undertaken at the behest of and entirely for the benefit of the bidding entity. In the case, the Court assumes that these three individual Plaintiffs spent a great deal of time preparing the bid; but they did so because, as officers and an employee of GIT, it was their paid duty to do so![2] If, instead, Kinghorn, Hoey and Thomas each were self-employed, and each had submitted his *own* bid for Defendant's project, then the Court might be able to entertain their complaints of individual dimension. As this is not the scenario to which the

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[2] The very essence of the corporate being – in Florida and elsewhere – is that it is a *cohesive entity* operating for a lawful purpose, and, generally, for profit. While it is individuals, no doubt, who operate, manage and invest in the entity, the corporation has a *separate* existence, and holds itself out to the world as a *singular* creature. The law reflects this: the corporate employee is rarely, if ever, held liable for the acts of the corporation; the officer, for the most part, is liable only in egregious situations where duties of care are breached; and the investor is generally liable only to the extent of his interest. When the corporation succeeds or is harmed, the consequences are visited on these individuals only *indirectly*.

In the instant case, Kinghorn, Hoey and Thomas could have been affected in many different ways, both positively and negatively by the award or rejection of GIT's bid (e.g., salary adjustment, job security, other job opportunities). Nevertheless, for the purpose of Article III standing, these effects can fairly be said to be only incidental in nature.

Amended Complaint alludes, then the "distinct and palpable injury," if any, *Warth*, 422 U.S. at 501, belongs to GIT, not to Kinghorn, Hoey or Thomas. Accordingly, Counts II, III, V, VI, and XI-XIII are **DISMISSED WITH PREJUDICE.**

Associational Standing of Plaintiff GIT

In Count I and IV GIT, on behalf of its "members," asserts violations of the Privileges and Immunities Clauses of Articles IV, section 2 and of the Fourteenth Amendment. Under certain circumstances, an organization may obtain standing on behalf of its members. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Nevertheless, the Court need not even reach a discussion of the three criteria set forth in *Hunt*, because GIT, quite simply, is not an organization with "members." GIT's Articles of Incorporation, to which Defendant alludes in support of its Motion, state that the nature of the business is specialty construction, and list a series of generic corporate powers. Basic capitalization figures are provided, as are the names of the Directors and Officers. *See* Attachment A to Defendant's (Doc. No. 28). No reference is made to the existence of "members" of any kind, likely because the incorporators did not intend GIT to be a "membership": they intended it to be a for-profit *corporation*, organized under and subject to the corporate laws of the state of Florida. This type of corporate entity does not have "members."

In opposing the Motion with respect to this issue, Plaintiffs utterly fail to show the Court why GIT should be considered an association consisting of members,

merely attempting, instead, to show how the requisites for associational standing are met. Of course, as stated above, the Court declines to engage in the latter analysis because Plaintiffs have failed to establish that GIT is an entity capable of asserting claims of any "members." The Court finds that there are no genuine issues of material fact with respect to this issue, and that Defendant is entitled to judgment as a matter of law. Accordingly, Defendants are entitled to summary judgment on Counts I and IV of the Amended Complaint.

Plaintiff GIT – Substantive and Procedural Due Process

In Counts VII and VIII, GIT alleges, in its corporate capacity, that the bidding procedures used by Defendant in awarding the landfill contract violated both the substantive and procedural components of the Due Process Clause of the Fourteenth Amendment, in that Defendant, in awarding the contract to another bidder, denied GIT its protected interests.

As stated by the Supreme Court in the landmark case *Board of Regents of State Colleges v. Roth*:

> To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it.

408 U.S. 574, 577 (1972). Property interests are not created by the Constitution, however, *id.*, and the sufficiency of a claim of entitlement must instead be decided by reference to state law. *Bishop v. Wood*, 426 U.S. 341, 344 (1976). In the instant case, the legitimacy of GIT's claim in this regard can be determined by reference to the bidding regulations

promulgated by Defendant and made available to *all* bidders prior to the submission date. Upon a review of this material is patently clear that GIT had no legitimate claim of entitlement to the landfill contract.

It is not contested that GIT was the lowest bidder. However, GIT would have the Court ignore the other factors of which GIT was undoubtedly on notice – or should have been – at the time the bid was submitted. On July 16, 1987, the Board passed and adopted County Resolution 87R-21, which states, in relevant part (emphasis supplied):

> The general policy of the Board [of County Commissioners of Columbia County] is to award the purchase or contract to the lowest bidder; *however, other contributing factors may justify awarding to a higher or more responsible bidder.* Other contributing factors include, *but are not limited to,* . . . prior history with the County including favorable contracts, commodities or services, and *residence and place of business of contractor,* subcontractors, and suppliers. *With these and other contributing factors [the] Board of County Commissioners reserves the right to award a bid which will be in the best interests of the County.*

On April 7, 1988, the Board passed and adopted Resolution 88R-16, amending the "Awarding Bids" section of the County Purchasing Manual. Resolution 88R-16 contained identical language as 87R-21, except for two new sentences, added before the last sentence. This additional portion read:

> *The bid of a resident of Columbia County, Florida shall have a 5% preference over the bid submitted by any non-resident of Columbia County, Florida. A*

> *resident shall mean* . . . [describing residency criteria – not contested in this case].

Bids for the instant project were solicited on February 15, 1991. The Instructions to Bidders, which GIT possessed during the solicitation period, contain the following section (emphasis supplied);

> 7.0 AWARD OF CONTRACT AND EXECUTION OF AGREEMENT
>
> 7.1 The basis of award of the Contract, if let, will be the lowest responsible Bidder. However, in keeping with the County's policy of considering other contributing factors (Resolution 87R-21) such as prior history with the County and residence and place of business of Contractor, subcontractor, and suppliers, *the County reserves the right to award the Contract to other than the lowest Bidder at the County's discretion.*

Defendant concedes that, "through an oversight," the Instructions did not specifically refer to Resolution 88R-16. Affidavit of Dale Williams (County Coordinator) at 4. It is upon this "oversight" that nearly GIT's entire due process argument is premised. However, several factors weigh heavily in favor of Defendant's position that no constitutional violation occurred.

Although 88R-16 was not specifically referenced in the Instructions, it was on the County books for nearly *three years* at the time the bids were solicited. If, as both GIT and Defendant state, GIT previously had performed little or no work for Defendant, then it behooved GIT to familiarize itself with Defendant's *current* version of bid regulations. 88R-16 was not, as Plaintiffs would have the

Court believe, some last minute decree that Defendant slipped into its regulations after the bid process ended.

Also, Instruction 7.1 explicitly stated that the County reserved the right to award the contract to one other than the lowest bidder, and stated that criteria which the County could consider included *residence and place of business* of the bidder. In essence, all 88R-16 really did "new" was to state a specific mathematical degree to which Columbia County bidders would be given preference, as 87R-21 already made clear that place of business would be a factor. Surely, 87R-21's allusion to residence and place of business was not an admonition too subtle for GIT to fathom.[3]

Based on the foregoing, the Court finds that GIT had, if anything, merely an expectation – shared by the six other losing bidders – in receiving the contract, but had no entitlement to the contract. Moreover, the procedures employed by Defendant during the bid solicitation period sufficiently put GIT on notice of the criteria Defendant would consider in making its selection. Accordingly, there was no deprivation of any of GIT's substantive or procedural due process rights, and Defendant is entitled to summary judgment on Counts VII and VIII.

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[3] In light of what is stated in 87R-21, is it that difficult to understand what residence and place of business – i.e., which County – would be preferred?

Plaintiff GIT-Commerce Clause and Equal Protection Clause

Summary judgment also is warranted on behalf of Defendant as to Count IX, GIT's Commerce Clause claim. Essentially, GIT asserts that Defendant arbitrarily and capriciously violated the Commerce Clause by enacting resolutions which impede the flow of interstate commerce. Since it is clear that both GIT and Defendant are Florida entities, and the project in dispute was located within Florida, it is not apparent to the Court how interstate commerce was or could have been affected – and how the Commerce Clause could be implicated – by Defendant's choice of bid.

Nevertheless, Defendant's main argument on this point is that it is a governmental entity acting solely as a market participant, not a regulator, and that it therefore is not subject to the constraints of the Commerce Clause. There is much support for this proposition. While state regulatory powers must give way to the superior power of Congress to legislate on or leave unregulated matters concerning interstate commerce, no conflict arises when the state acts solely as a market participant. *United Building & Constr. Trades v. Mayor*, 465 U.S. 208, 220 (1984); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 206-08 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980). In the absence of Congressional action, the Commerce Clause does not prohibit a state from participating in the market and exercising the right to favor its own citizens over others. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1975).

Upon review of the record in this matter, the Court finds that Defendant was acting as a market participant in its solicitation of bids for the landfill contract, and should thus be shielded from any liability under the Commerce Clause, which does not apply to this dispute.

Finally, GIT's alleged violation of the Fourteenth Amendment's Equal Protection Clause (Count X) similarly must fail. For the purposes of this Clause, there is no fundamental right to government employment. *Mayor,* 465 U.S. at 219; *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976). As Defendants correctly note, because no fundamental right is implicated by this governmental action, Defendant need only show that its acts were rationally related to a legitimate state interest. *See Pennel v. San Jose,* 485 U.S. 1, 14 (1988); *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). A state action not burdening a fundamental interest should not be overturned unless the varying treatment of different groups or persons is "so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the [defendant's] actions were irrational." *Vance v. Bradley,* 440 U.S. 93, 97 (1979).

This is not a difficult relationship to establish, *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869, 881 (1985), and the Court concludes that Defendant has articulated legitimate reasons for the bid process it employed (and ultimate selection it made) in the instant case. It certainly was a legitimate aim of Defendant to provide work for local contractors, who presumably would hire local workers. The practicality and sensibility of this approach is underscored in the Affidavit of Dale Williams, in which he stated that the choice of Anderson-Columbia ("A-C")

(as opposed to GIT) was based on many pragmatic factors. It was important to have a local company "accessible both during and after construction should problems arise with the landfill." Affidavit at 6. Furthermore, A-C had provided quality work for Defendant in the past, and Defendant "had had satisfactory working relationships with them." *Id.* Lastly, Williams stated, A-C's bid was only 1.8% higher than GIT's.

Accordingly, and for the reasons stated above, with respect to the claims of Plaintiffs Kinghorn, Hoey and Thomas (Counts II, III, V, VI and XI-XIII), Defendant's Motion to Dismiss (Doc. No. 28) is **GRANTED.** With respect to the remainder of the Counts in the Amended Complaint, those claims of GIT, the Court **GRANTS** Defendant's alternative Motion for Summary Judgment (Doc. No. 28). Plaintiff's Motion for Summary Judgment (Doc. No. 57), which raises the same issues addressed above, is **DENIED.**

The Clerk hereby is directed to: (1) enter judgment for Defendant with respect to all claims of all Plaintiffs; (2) tax costs accordingly; and (3) close the file.

DONE AND ORDERED at Jacksonville, Florida this 18 day of October, 1993.

HARVEY E. SCHLESINGER
United States District Judge

Copies to:

Gregory T. Stewart, Esquire
Thomas H. Duffy, Esquire
Steven R. Schooley, Esquire
Matthew A. Myers, Esquire

RESOLUTION NO. 88R-16

RESOLUTION AMENDING THE COLUMBIA COUNTY PURCHASING MANUAL BY AMENDING SUBSECTION 6 OF SECTION V ENTITLED "AWARDING BIDS".

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF COLUMBIA COUNTY, FLORIDA that Subsection 6 of Section V, of the Columbia County Purchasing Manual entitled "Awarding Bids" be, and the same is hereby amended to read as follows:

SECTION V

6. Awarding Bids

The general policy of the Board is to award the purchase or contract to the lowest bidder; however, other contributing factors may justify awarding to a higher or more responsible bidder. Other contributing factors include, but are not limited to; life-cycle or total cost bidding; exceeding minimum specifications at a relatively minor cost which would better benefit the County; prior history with the County including favorable contracts, commodities, or services, and residence and place of business of contractor, subcontractors, and suppliers. *The bid of a resident of Columbia County, Florida shall have a 5% preference over the bid submitted by any non-resident of Columbia County, Florida. A resident shall mean an individual whose primary residence is within Columbia County, Florida, a partnership whose principals are all residents of Columbia County, Florida, a Florida Corporation, partnership or other business entity whose principal place of business is within Columbia County, Florida, or which maintains a full time business office open to the public within Columbia County, Florida.* With

these and other contributing factors the Board of County Commissioners reserves the right to award a bid which will be in the best interest of the County.

Passed and adopted this 7th day of April, 1988.

(OFFICIAL SEAL)

ATTEST:

Mary M. Petry
Clerk of
Circuit Court

Board of County Commissioners
of Columbia County, Florida

by: _____
James Montgomery
Chairman

Supreme Court, U.S.
FILED
MAY 31 1995
OFFICE OF THE CLERK

(2)

No. 94-1801

In The

Supreme Court of the United States

October Term, 1994

GROUND IMPROVEMENT TECHNIQUES, INC., ROBERT E. KINGHORN, TED L. HOEY, and CHARLIE THOMAS,

Petitioners,

v.

COLUMBIA COUNTY, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GREGORY THOMAS STEWART
Counsel of Record
NABORS, GIBLIN
& NICKERSON, P.A.
Barnett Bank Building, Suite 800
315 South Calhoun Street
Tallahassee, Florida 32301
(904) 224-4070

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2798

QUESTIONS PRESENTED

I. Whether individual employees, shareholders or officers of a corporation have standing to constitutionally challenge local government bid procedures when the bid at issue was submitted by the corporation, not the employees, shareholders and officers thereof.

II. Whether a locally-applied bid preference policy, adopted only for county contracts, can withstand constitutional scrutiny under various clauses of the Fourteenth Amendment and the Commerce Clause of the United States Constitution.

III. Whether a corporation organized under the laws of the State of Florida has standing to raise a claim under the Privileges and Immunities Clauses of Article IV, Section 2 and the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

Petitioners are Ground Improvement Techniques, Inc., a Florida corporation; Ted L. Hoey, an officer and shareholder of Ground Improvement Techniques, Inc.; Robert E. Kinghorn, an officer and shareholder of Ground Improvement Techniques, Inc.; and Charlie Thomas, an employee of Ground Improvement Techniques, Inc. Ground Improvement Techniques, Inc. has no parent companies and no subsidiaries. The Respondent is Columbia County, Florida, a political subdivision of the State of Florida.

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OPINIONS BELOW

On October 18, 1993, the United States District Court for the Middle District of Florida granted Respondent's Motion to Dismiss, or in the Alternative, for Summary Judgment. The Order of the District Court dismissed the individual Petitioners' constitutional claims against Columbia County and granted summary judgment in favor of Columbia County on the corporate Petitioner's constitutional claims. On January 30, 1995, the United States Court of Appeals for the Eleventh Circuit affirmed, per curiam, the District Court's Order, without an opinion. Neither of these decisions is published, but the orders are reproduced in the Appendix to the Petition for Writ of Certiorari (hereinafter "Pet. App.") filed by Ground Improvement Techniques, Inc., Robert E. Kinghorn, Ted L. Hoey and Charlie Thomas. (Pet. App. 1-16).

STATEMENT OF JURISDICTION

The Respondent hereby adopts the Statement of Jurisdiction contained within the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions cited by the Petitioners, Respondent submits the following to this Court:

Columbia County Resolution 87R-21 (reproduced in Respondent's Appendix as "Appendix A");

Columbia County's Instructions to Bidders (excerpts reproduced in Respondent's Appendix as "Appendix B").

STATEMENT OF THE CASE

On February 15, 1991, Columbia County ("the County"), a political subdivision of the State of Florida, solicited bids to award a construction contract for the County's solid waste landfill. (Pet. App. 12). The Instructions to Bidders outlined the criteria governing the County's bid procedure and contract award. (Pet. App. 12). These criteria included:

> The basis of award of the Contract, if let, will be the lowest responsible Bidder. *However*, in keeping with the County's policy of considering other contributing factors (Resolution No. 87R-21) such as prior history with the County and residence and place of business of Contractor, subcontractor, and suppliers, *the County reserves the right to award the Contract to other than the lowest Bidder at the County's discretion.*

(Appendix B-1) (emphasis added).

Columbia County Resolution 87R-21, referenced in the Instructions to Bidders, articulated the factors, in addition to the dollar amount of the bid, which the County could consider in awarding the contract. (Pet. App. 11). Specifically, Resolution 87R-21 stated:

> The general policy of the Board [of the County Commissioners of Columbia County] is to

> award the purchase or contract to the lowest bidder; *however, other contributing factors may justify awarding to a higher or more responsible bidder.* Other contributing factors include, but are not limited to, . . . prior history with the County including favorable contracts, commodities or services, and residence and place of business of contractor, subcontractor, and suppliers.

(Appendix A-1) (emphasis added).

In 1988, the County adopted Resolution 88R-16, which amended Resolution 87R-21. Resolution 88R-16 was identical to the previous resolution except for the addition of two sentences, "The bid of a resident of Columbia County, Florida shall have a 5% preference over the bids submitted by any non-resident of Columbia County, Florida. A resident shall mean [definitions provided]." (Pet. App. 17). The Instructions to Bidders issued for the County's landfill construction contract inadvertently omitted a specific reference to County Resolution 88R-16 and only Resolution 87R-21 was referenced in the Instructions to Bidders. (Pet. App. 12).

On April 4, 1991, the County awarded the landfill construction contract to the second lowest bidder whose bid was only 1.8% higher than the bid from Ground Improvement Techniques, Inc., the lowest bidder. (Pet. App. 11). The second lowest bidder, to which the County awarded the contract, was a contractor located in Columbia County which had performed several successful and favorable contracts with the County in the past. Whereas, Ground Improvement Techniques, Inc., although a Florida corporation, was not a local company and had never performed any prior contracts for the County.

In September 1991, Ground Improvement Techniques, Inc. filed suit in the United States District Court for the Middle District of Florida against the County under 42 U.S.C. § 1983, naming Ground Improvement Techniques, Inc., a Florida corporation ("corporate Petitioner"), and three officers, shareholders, and employees of the corporate Petitioner ("individual Petitioners") as Plaintiffs. After the District Court granted a motion to dismiss, the Petitioners filed an Amended Complaint in May 1992 alleging 13 counts of constitutional claims against the County's bid procedures. (Pet. App. 2-3). These allegations included, with respect to the individual Petitioners, violations of the Privileges and Immunities Clauses under both Article IV, Section 2 and the Fourteenth Amendment, and claims under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. (Pet. App. 6). The Amended Complaint also alleged violations of both Privileges and Immunities Clauses, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the Commerce Clause, with respect to the corporate Petitioner. (Pet. App. 10, 14).

The County filed a Motion to Dismiss Amended Complaint, or in the Alternative for Summary Judgment. (Pet. App. 2). On October 18, 1993, the District Court entered an order dismissing the claims of the individual Petitioners due to a lack of Article III standing and granting the County's motion for summary judgment with respect to the claims of the corporate Petitioner on their merits. (Pet. App. 16). The Petitioners appealed to the United States Court of Appeals for the Eleventh Circuit,

which affirmed the District Court's order, per curiam, without an opinion. (Pet. App. 1).

SUMMARY OF THE ARGUMENT

The corporate Petitioner has no standing to challenge the County's resolutions and bid procedures under the Privileges and Immunities Clauses of the United States Constitution. Historically, corporate entities lack standing under these clauses because they are not "citizens" entitled to their protections. This general rule of law has been consistently applied throughout the American courts for over 100 years. In addition, the individual Petitioners cannot maintain standing to assert their constitutional challenges in this case. They have suffered no direct, actual injury sufficient to meet the "case or controversy" requirement of Article III of the United States Constitution. The only harm, if any, suffered by the individual Petitioners is derived from an alleged injury to the corporate Petitioner. Such a derived injury cannot support constitutional standing.

Furthermore, the Petitioners have failed to raise a substantial question of law concerning the validity of the County's bid procedures in this case. The cases cited by the Petitioners as support for this "conflict" simply do not present legal questions which are similar enough to each other to create a conflict. In fact, the cases cited by the Petitioners reveal that the courts are consistently

applying the same constitutional standards to the issues as presented by their cases.

REASONS FOR DENYING THE WRIT

I. THE COURTS BELOW CORRECTLY RULED THAT THE INDIVIDUAL PETITIONERS AS EMPLOYEES, SHAREHOLDERS, AND OFFICERS DO NOT HAVE STANDING.

The Petitioners fail to raise a substantial question of law or conflict among the American courts on the issue of whether individual shareholders or officers of a corporation have standing for alleged constitutional violations when the Article III injury-in-fact accrues to the business entity, not the individuals who compose that entity. In the instant case, the District Court stated quite clearly, "While . . . individuals, no doubt, . . . operate, manage and invest in the entity, the corporation has a *separate* existence, and holds itself out to the world as a *singular* creature." (Pet. App. 8, n.2) (emphasis in original). Furthermore, the District Court noted, "When the corporation succeeds or is harmed, the consequences are visited on these individuals [employees, shareholders, officers] only *indirectly*." (Pet. App. 8, n.2) (emphasis in original).

To maintain standing under Article III, claimants must demonstrate that a direct, real or immediate injury resulted from the government's conduct, that a nexus exists between the government's official conduct and the injury, and that the injury can be redressed by the requested relief. *Warth v. Seldin*, 422 U.S. 490 (1975); *Valley Forge Christian College v. Americans United for Separation of*

Church and State, Inc., 454 U.S. 464 (1982); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Whitmore v. Arkansas*, 495 U.S. 149 (1990). In the instant case, the individual Petitioners cannot meet these requirements because they have suffered no direct or actual injury by the County's denial of the corporate Petitioner's bid. Any harm suffered by the individual Petitioners is derived from the alleged injury to the corporate Petitioner as a business entity; such a derived injury is insufficient for Article III standing. *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1317 (4th Cir. 1994) ("If . . . [shareholder and officer] had submitted bids as an individual, or if [contractor] were not incorporated, [shareholder and officer] would have standing to assert this [constitutional] claim. But the bids here were the corporation's, and so is the injury."); *Erlich v. Glasner*, 418 F.2d 226 (9th Cir. 1969) (shareholder, as an individual, could not maintain an action under the Civil Rights Act for damages suffered by the corporation); *Sterngass v. Bowman*, 563 F. Supp. 456 (S.D.N.Y.), *aff'd*, 742 F.2d 1440 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984) (shareholders lacked standing to assert civil rights claims when the gravamen of their complaint described injuries to the corporation); *Marty's Adult World of New Britain, Inc. v. Guida*, 453 F. Supp. 810 (D. Conn. 1978) (shareholders who argued loss of anticipated salaries lacked standing because damages were to their corporation).

The Petitioners, however, assert that the courts below ignored assistance provided by this Court's holding and discussion in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508

U.S. ___, 113 S. Ct. 2297 (1993). In *Northeastern*, the plaintiff was a contracting association which challenged a city ordinance requiring that 10% of the annual amount spent on city contracts be for "Minority Business Enterprises." This Court determined that the association need not show that one of its corporate members would have received a city contract, but for the ordinance, to demonstrate injury-in-fact for Article III standing.

Although the *Northeastern* case clarified portions of the associational standing exception, *see Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), it provides no benefit to the claims of the individual Petitioners in this case. The individual Petitioners fail to recognize that the members of the association determined to have standing in *Northeastern* were the entities which would have bid for city contracts and would have suffered an injury from the city ordinance, not the individual employees, shareholders or officers of those entities.

II. THE ESTABLISHED CRITERIA FOR EVALUATING EACH CONSTITUTIONAL CHALLENGE RAISED BY THE PETITIONERS WAS CORRECTLY APPLIED BY THE COURTS BELOW.

The Petitioners assert that this Court has incompletely addressed the validity of local bid preferences in public contracting and that this "void" has created "a growing line of conflicting federal and state court decisions that involve the constitutionality of local preference resolutions." (Petition, 5). However, the cases which the Petitioners cite as conflicting and exemplifying the need

for this Court's clarification address differing issues and public contracting policies.

For example, the Petitioners assert that the cases of *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994), and *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984), conflict with one another and exemplify the uncertainty created by this Court's inability to substantively address the Privileges and Immunities challenge in *City of Camden*, 465 U.S. 208 (1984), due to an incomplete record.

No such conflict or uncertainty exists. In *Smith Setzer & Sons, Inc.*, 20 F.3d 1311 (4th Cir. 1994), a North Carolina corporation and the president and shareholder of the corporation, raised challenges to the State of South Carolina's bid preference for South Carolina vendors and products under the Privileges and Immunities Clauses, Commerce Clause, and Equal Protection Clause. The court rejected the Privileges and Immunities challenge because of its inapplicability to corporations and the lack of standing for the corporation's shareholder. *Id.* at 1318. The Commerce Clause challenge was also rejected as the court concluded that the State of South Carolina was acting under the market participant exception to the Commerce Clause. *Id.* at 1320. Finally, the court held that under the rational basis scrutiny of the Equal Protection Clause, the bid preferences at issue did not infringe upon the protections of the Fourteenth Amendment. *Id.*

The court in *Smith Setzer & Sons, Inc.* recognized that the case of *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984), invalidated a state-wide residential bid preference under the Commerce Clause; however,

these two cases present different factual situations, permitting rational differences in the application of the market participant exception to the Commerce Clause. In fact, the court in *W.C.M. Window* used the same analysis for the market participant exception as was applied in *Smith Setzer & Sons, Inc.* and reached the same conclusion on standing under the Privileges and Immunities Clauses as the court in *Smith Setzer & Sons, Inc.* Finally, although the court in *W.C.M. Window* chose to discuss the merits of the claim under the Privileges and Immunities Clauses (in part because of the case's procedural posture), the court's substantive analysis used the same criteria as described in *United Building and Construction Trades Council of Camden County v. City of Camden*, 465 U.S. 208 (1984).

In addition, no conflict exists among any of the additional cases which the Petitioners cite for a conflict. Concededly, all the cases cited by the Petitioners involve some form of a public contract bidding requirement which, to varying degrees, benefit one segment of society and place burdens on another. But, otherwise any similarity among the cases is imaginary. The cases of *Rayco Construction Co., Inc. v. Vorsanger*, 397 F. Supp. 1105 (E.D. Ark. 1975), and *E & E Construction Co. v. Illinois*, 674 F. Supp. 269 (N.D. Ill. 1987), do not, as the Petitioners assert, conflict with *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), and *J.F. Shea Co., Inc. v. City of Chicago*, 992 F.2d 745 (7th Cir. 1993).

For example, the residential bid preference at issue in *Rayco Construction Co.*, 397 F. Supp. 1105 (E.D. Ark. 1975),

was exceedingly broad as it applied to all public contracts, over $10,000, with the State of Arkansas, its agencies and political subdivisions. The court concluded that this preference was invalid under an equal protection and due process analysis, but the court refused to address the challenges raised on the basis of the Commerce Clause. Furthermore, no conflict is raised by the decision in *E & E Construction Co.*, 674 F. Supp. 269 (N.D. Ill. 1987). In that case, the court did not address the merits of any of the alleged constitutional claims alleged. Rather, the court merely concluded that a cause of action was stated for each claim, thus, defeating the defendant's motion to dismiss. Although, the court in *E & E Construction Co.*, did recognize the inability of a corporation to maintain standing under the Privileges and Immunities Clauses.

In contrast, the official government conduct under attack in *Associated General Contractors of California*, 813 F.2d 944 (9th Cir. 1987), did not even relate to residential bid preferences. The bid policies upheld in *Associated General Contractors of California* were ones providing preferences based on minority and gender status under affirmative action plans of the local governments. Additionally, in *J.F. Shea Co., Inc. v. City of Chicago*, 992 F.2d 745 (7th Cir. 1993), the court upheld a local bid preference under the market participant exception to the Commerce Clause and concluded that an individual employee of the plaintiff corporation had no standing under the Privileges and Immunities Clauses.

Clearly no conflict exists between these two groups of cases. Not one of these cases addresses the same constitutional issue, in the same procedural posture, and under the same factual constraints as another. With so

many differences among these cases, no conflict could possibly exist.

Finally, the Petitioners assert that the case of *Galesburg Construction Company, Inc. v. Memorial Hospital of Converse County*, 641 P.2d 745 (Wyo. 1982), in which the court upheld a state-wide residential bid preference under equal protection and due process challenges, conflicts with *Big D Construction Corp. v. Court of Appeals for the State of Arizona, Division One*, 789 P.2d 1061 (Ariz. 1990), in which the court struck a state-wide residential bid preference under an equal protection challenge. At first blush, the Petitioners appear to finally have found a conflict. However, a closer examination of these cases reveals that no such conflict exists.

For example, in *Big D Construction Corporation*, 789 P.2d 1061 (Ariz. 1990), the court distinguished the *Big D Construction* bid preference scheme and the typical residential bid preference policies otherwise upheld under equal protection scrutiny. The court also included a specific distinction between the Arizona statute and the statute at issue in *Galesburg Construction Company*. 789 P.2d at 1070-71. The court explained that in *Big D Construction*, the Arizona statute provided a 5% preference to "resident contractors paying *taxes on a plant* within the state, or the equivalent thereof, for two years immediately prior to the awarding of the contract." 789 P.2d at 1064 (emphasis in original). Whereas, in *Galesburg Construction Company*, 641 P.2d 745 (Wyo. 1982), the Wyoming statute at issue granted a 5% preference to residential contractors over non-residential contractors.

The court in *Big D Construction* distinguished these two statutory schemes by stating that at least in *Galesburg Construction Company*, the bid preference rationally related to the purposes of employing state residents and supporting the state economy; however, the tax-based preference of *Big D Construction* actually discouraged these same stated purposes. The court noted, "All of the cases that uphold preference statutes do so on bases no longer reflected in Arizona's statutes - residency, in-state presence, in-state employment, payment of a relevant amount of taxes, and the like." 789 P.2d at 1071.

The Petitioners are simply mistaken that this Court's treatment of *United Building and Construction Trades Council of Camden County v. City of Camden*, 465 U.S. 208 (1984), has created conflicts among the circuit courts of appeal, district courts, or state courts of last resort. If anything, the cases cited by the Petitioners for their argument reveal the consistency of American courts, at all jurisdictional levels, in applying the same standards to the legal challenges and factual situations presented. The differences in ultimate results in the cases cited by the Petitioners are explained, not by legal standards inconsistently applied, but by the different factual scenarios presented and the different legal challenges mounted by the different plaintiff combinations.

III. THE COURTS BELOW CORRECTLY RULED THAT THE CORPORATE PETITIONER COULD NOT MAINTAIN STANDING UNDER THE PRIVILEGES AND IMMUNITIES CLAUSES.

The question of whether an incorporated business entity, like Ground Improvements Techniques, Inc., has

standing to challenge government action under the Privileges and Immunities Clause was decided by this Court over 100 years ago. *Paul v. Virginia*, 75 U.S. 168 (1868). The Privileges and Immunities Clause of Article IV, Section 2 states, "The Citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The same clause of the Fourteenth Amendment proclaims, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]"

This Court interpreted the word "citizens" to apply "only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed." *Paul v. Virginia*, 75 U.S. at 177. This interpretation of both Privileges and Immunities Clauses has been consistently applied by this Court and among the circuit courts of appeals. *See, e.g., Western & Southern Life Ins. Co. v. California Bd. of Equalization*, 451 U.S. 648 (1981); *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994); *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984).

The policies against expanding the protection of the Privileges and Immunities Clauses to incorporated business entities are clearly articulated and consistently followed throughout the American courts at all jurisdictional levels. For example, in *Paul v. Virginia*, 75 U.S. 168 (1868), this Court recognized that "a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting

them . . . from individual liability." *Id.* at 181. These policies remain in force and effect as exemplified by the United States Court of Appeals for the Fourth Circuit in *Smith Setzer v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994). There, the court stated, "In deciding to conduct business through a corporate form, the shareholders of a corporation limit their exposure to direct personal liability. . . . " *Id.* at 1317. Thus, "[a] corporation is treated, for Privileges and Immunities Clause purposes among others, as a separate entity." *Id.*

The Petitioners assert that the language relied upon by many courts in *Paul v. Virginia*, 75 U.S. 168 (1868), for the proposition that the respective Privileges and Immunities Clauses do not protect corporate entities is mere dicta. Thus, according to the Petitioners, a "doctrinal void" exists on the issue of corporate standing under the Privileges and Immunities Clauses and the void "has left modern corporate employees without the same constitutional privileges and immunities protections or civil rights afforded all other workers in modern society." (Petition, 7). The County obviously disagrees that the language in *Paul v. Virginia* is mere dicta, and asserts that the Petitioners forget that all the corporate Petitioner's constitutional claims, except the one based on the Privileges and Immunities Clauses, were addressed, on their merits, by the courts below. Clearly, then, the civil rights of the corporate Petitioner have been protected despite *Paul v. Virginia*.

CONCLUSION

The Petitioners fail to present any conflict between the circuit courts of appeal, the district courts, or the state courts of last resort on the issues in this case. The Petitioners also fail to present any substantial question of law in need of clarification by this Court. Thus, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

GREGORY THOMAS STEWART
Counsel of Record
NABORS, GIBLIN & NICKERSON, P.A.
Barnett Bank Building, Suite 800
315 South Calhoun Street
Tallahassee, Florida 32301
(904) 224-4070

Attorneys for Respondent

APPENDIX A

RESOLUTION NO. 87-R21

RESOLUTION AMENDING THE COLUMBIA COUNTY PURCHASING MANUAL BY AMENDING SUBSECTION 6 OF SECTION V ENTITLED "AWARDING BIDS".

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF COLUMBIA COUNTY, FLORIDA that Subsection 6 of Section V, of the Columbia County Purchasing Manual entitled "Awarding Bids" be, and the same is hereby amended to read as follows:

SECTION V

6. Awarding Bids

The general policy of the Board is to award the purchase or contract to the lowest bidder; however, other contributing factors may justify awarding to a higher *or* more responsible bidder. Other contributing factors include, but are not limited to: life-cycle or total cost bidding; exceeding minimum specifications at a relatively minor cost which would better benefit the County; prior history with the County including favorable contracts, commodities, or services, *and residence and place of business of contractor, subcontractors, and suppliers.* With these and other contributing factors to Board of County Commissioners reserves the right to award a bid which will be in the best interest of the County.

Passed and adopted this 16th day of July, 1987.

(OFFICIAL SEAL)

ATTEST:

/s/ Mary B. Childs
Mary B. Childs
Clerk of
Circuit Court

Board of County
Commissioners
of Columbia County,
Florida

by: /s/ James Montgomery
James Montgomery
Chairman

APPENDIX B

7.0 AWARD OF CONTRACT AND EXECUTION OF AGREEMENT

7.1 The basis of award of the Contract, if let, will be the lowest responsible Bidder. However, in keeping with the County's policy of considering other contributing factors (Resolution No. 87R-21) such as prior history with the County and residence and place of business of Contractor, subcontractor, and suppliers, the County reserves the right to award the Contract to other than the lowest Bidder at the County's discretion. The Owner shall make such investigations as deemed necessary to determine the ability of the Bidder to perform the work, and the Bidder shall furnish to the Owner all such information and data for this purpose as the Owner may request. The Owner reserves the right to reject any Bid if the evidence submitted by, or investigation of, the Bidder fails to satisfy the Owner of the Bidder's ability to perform the work.

7.2 The Owner shall have the right to waive any informalities or minor irregularities, to accept any Bid or to reject any and all Bids, as in the Owner's judgment, best serves the Owner's interest.

7.3 The Owner shall issue the Notice of Award in the form provided in the Contract Documents. The successful Bidder shall, within 10 calendar days of receipt of the Notice of Award, furnish the Owner with the following:

A. Five executed duplicate originals of the Agreement in the form in the Contract Documents.

B. Five executed duplicate originals of the Performance Bond and five executed duplicate

originals of the Payment Bond, all in the forms provided in the Contract Documents. The Performance Bond and the Payment Bond shall each be payable to the Owner in the amount of 100 percent of the Contract Price, and shall be furnished by the Surety which previously agreed by the notarized letter submitted with the Bid to furnish said Bonds. If the Performance Bond and/or the Payment Bond are signed by an attorney-in-fact, the attorney-in-fact shall submit with the Bond(s) an original, certified and effected dated copy of his power of attorney.

C. Five duplicate originals of the Certificate(s) of Insurance satisfactory to the Owner indicating compliance with the requirements of the Contract Specifications.

7.4 Should the successful Bidder fail to furnish the executed Agreement, Performance Bond, Payment Bond, and/or Certificate(s) of Insurance within the specified period, the Owner may declare the Bidder to be in default, and the Bidder's Bid Bond shall become the property of the Owner.

7.5 Within 15 calendar days of receipt of a satisfactory Agreement, Performance Bond, Payment Bond, and Certificate(s) of Insurance from the successful Bidder, the Owner shall execute the duplicate originals of the Agreement. Should the Owner fail to execute the Agreement within the specified period, the Bidder may, by Written Notice, withdraw the Agreement without further liability on the part of either the Owner or the Contractor.

7.6 The Owner and the Engineer shall schedule the preconstruction conference. The Notice to Proceed, in the

form provided in the Contract Documents, and the Contractor's copy of the complete set of executed Contract Documents shall be issued at the preconstruction conference. If for any reason the Owner is unable to issue the Notice to Proceed at the preconstruction conference, the time may be extended by mutual agreement between the Owner and the Contractor, or the Contractor may, by Written Notice, terminate the Agreement without further liability on the part of the Owner or the Contractor.

7.7 Within 15 days of commencement of the work, the Contractor shall submit a construction schedule as directed in the Special Conditions.

END OF SECTION